(1)

No. 03 195

In The

Supreme Court of the United States

JAMES V. JIMENEZ,

Cross-Petitioner,

v.

PAW-PAW'S CAMPER CITY, INC.,

Cross-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

CONDITIONAL CROSS PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the remittitur affirmed by the Fifth Circuit was unnecessary under and contrary to the Supreme Court's instructions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mutual Automobile Insurance Company v. Campbell*, ___ U.S. ___, 123 S.Ct. 1513, (2003) and, therefore, constituted a usurpation of the jury's role.

II. Whether the Fifth Circuit erred in affirming the district court's erroneous application of two of *Gore's* three guideposts.

PARTIES TO THE PROCEEDING

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Paw-Paw's Camper City, Inc., Cross-Respondent;
2. W. B. Herring, Jr., Owner, Paw-Paw's Camper City, Inc.;
3. Matt Margetta, past owner and General Manager, Paw-Paw's Camper City, Inc.;
4. Larry G. Canada, attorney for Cross-Respondent, Paw-Paw's Camper City, Inc.;
5. James V. Jiminez, Cross-Petitioner
7. J. Christian Lewis, attorney for Cross-Petitioner.

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CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Petitioner Jimenez petitions the Court for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, which affirmed the district court's remittitur, is reported at *Jiminez v. Paw-Paw's Camper City, Inc.*, 64 Fed.Appx. 417, ___ F.3d ___ (Table), 2003 WL 1524644 (5th Cir. (La.), Mar. 17, 2003) and found in Appendix A to Paw-Paw's petition for writ of certiorari. The decision of the district court for the Eastern District of Louisiana is reported at *Jimenez v. Paw-Paw's Camper City, Inc.*, 2002 WL 257691 (E.D.La., Feb. 22, 2002) and found in Appendix B to Paw-Paw's petition for writ of certiorari. The decision of the Court of Appeals denying Paw-Paw's petition for rehearing en banc is contained in Appendix E to Paw-Paw's writ of certiorari.

JURISDICTION

This case was originally filed in the United States District Court for the Eastern District of Louisiana alleging claims under 42 U.S.C. § 2000e and 42 U.S.C. § 1981, presenting matters of federal question jurisdiction pursuant to 28 U.S.C. § 1331. The Fifth Circuit Court of Appeals had jurisdiction over the original appeal pursuant to 28 U.S.C. §§ 1291 and 1294. The Fifth Circuit Court of Appeals also had jurisdiction to Federal Rule of Appellate

Procedure 35 and Fifth Circuit Local Rule 35. The jurisdiction of this Court was invoked by Cross-Respondent Paw-Paw's Camper City, Inc. in its Petition for Writ of Certiorari, captioned Paw-Paw's Camper City, Inc. v. James V. Jimenez, United States Supreme Court, Docket No. 03-74. This cross petition for writ of certiorari is timely filed and made pursuant to U.S. Sup.Ct. Rule 12.5.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 1981 is set out verbatim in Appendix J of Paw-Paw's Petition for Writ of Certiorari.

42 U.S.C. § 1981a is set out verbatim in Mr. Jimenez's Opposition to Paw-Paw's Petition for Writ of Certiorari.

42 U.S.C. § 2000e is set out verbatim in Appendix K of Paw-Paw's Petition for Writ of Certiorari.

Further, 42 U.S.C. § 2000e-5(k) provides in part that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs."

Similarly, 42 U.S.C. § 1988 provides in part that "[i]n any action to enforce a provision of sections 1981 [or] 1981a . . ., the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

Cross-Petitioner Jimenez adopts for purposes of this brief the Statement of the Case set forth in Mr. Jimenez's brief in opposition to Paw-Paw's petition for writ of certiorari which summarizes the extensive evidence of racial slurs (spic, wetback, f - - - ing Mexican, "got your green card," etc.) directed by Paw-Paw's ownership and management against Mr. Jimenez.

REASONS FOR GRANTING MR. JIMENEZ'S CROSS-PETITION

Mr. Jimenez's writ should be granted because the Fifth Circuit erred in affirming the lower court's remittitur of the punitive damage award since the remittitur was unnecessary under and contrary to this Court's instructions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 1601 (1996) and *State Farm Mutual Automobile Insurance Company v. Campbell*, ___ U.S. ___, 123 S.Ct. 1513 (2003).

SUMMARY OF THE ARGUMENT

The jury's finding that Paw-Paw's subjected Mr. Jimenez to a hostile work environment was supported by the overwhelming testimony of six witnesses. Not only did the jury find that Paw-Paw's conduct created a hostile work environment, the district court also wrote that "the court finds a high degree of reprehensibility in the repeated, extensive, ethnically hostile verbal abuse by Paw-Paw's managers that plaintiff experienced, as found by the jury." (Paw-Paw's App. p.28a)

Despite finding Paw-Paw's conduct to have been reprehensible, the district court erred in reducing the jury's punitive damage award from $161,000 to $80,000 under an erroneous application of *Gore*. This application was error for three reasons. First, *Gore's* application to this matter is challenged inasmuch as the underlying concerns of overreaching which prompted the review of the punitive damage awards in *Gore* and in *Campbell* are not present here. Second, if *Gore* should apply, the district court, in reducing the punitive damages award, only compared the "actual" damage to Mr. Jimenez to the jury's punitive damages award. However, *Gore* also calls for a comparison between the "potential" or "likely" damage to Mr. Jimenez and the jury's punitive award. This analysis was not done and resulted in an inflated ratio of punitive to compensatory damages that prompted the erroneous remittitur. Third, the district court failed to compare the punitive damage award to analogous penalties "authorized" by law as called for in *Gore*. Such a comparison should have included those analogous penalties authorized by 42 U.S.C. § 1981a which allow awards up to $300,000. Mr. Jimenez submits that jury's award of $161,000 would not have been disturbed had the district court properly applied *Gore's* three guideposts.

ARGUMENT

I. The remittitur affirmed by the Fifth Circuit was unnecessary under and contrary to the Supreme Court's instructions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mutual Automobile Insurance Company v. Campbell*, ___ U.S. ___, 123 S.Ct. 1513 (2003) and, therefore, constituted a usurpation of the jury's role.

This Court's decisions in *Gore* and *Campbell* were founded upon the underlying concerns that the lower state courts overreached beyond the claims which were before them. The Court discussed extensively in both decisions the impropriety of punishing the respective defendants for conduct that bore no relation to those claims before the lower state courts. This Court in both decisions vacated the respective punitive damage awards once it determined that the lower courts had overreached in punishing each defendant beyond the plaintiff's claims before the lower court.

In *Gore*, the jury awarded four million dollars in punitive damages awarded pursuant to an Alabama statute. *Gore* at 565. The jury found defendant BMW liable under an Alabama statute not only for failing to disclose repainting performed on the plaintiff's car before its purchase but also for conduct occurring outside of Alabama. *Id.* at 563, and 572. The Court in *Gore* emphasized that the award was excessive because it overreached, that is (1) defendant BMW did not have adequate notice that its conduct actually violated Alabama's statute, (2) BMW did not have notice of the magnitude of the punishment Alabama may impose on minor infractions, and (3) the award represented Alabama's attempt to dictate the

policies of the other 49 states by punishing BMW for conduct occurring in other states. *Id.* at 570-573, 577-578.

Similarly, this Court in *Campbell* applied *Gore*'s three guideposts based upon its extensive determination that the State of Utah overreached and impermissibly punished defendant State Farm for conduct that "bore no relation to" the claims actually before the trial court. *Id.* at 1523. The Court noted that the lower court decisions rested upon not only the claims arising in Utah but also upon "State Farm's business practices for over 20 years in numerous states." *Id.* at 1519. The Court further noted that "Most of the practices bore no relation to third-party automobile claims" that were made by the plaintiff in the lower court. *Id.* The Court criticized the lower courts for using the case before it "as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country." *Id.* at 1521. The Court noted that "A State cannot punish a defendant for conduct that may have been lawful where it occurred" nor should it as a general rule "punish a defendant for unlawful acts committed outside of the State's jurisdiction." *Id.* at 1522.

This Court emphasized in *Gore* that a jury is granted considerable latitude in awarding punitive damages and the decision will be overridden "only when an award can be fairly characterized as 'grossly excessive'" in relation to the "State's legitimate interests in punishment and deterrence." *Gore* at 568. This Court determined in both *Gore* and *Campbell* that the lower courts overreached beyond their respective state's interest with the punitive damage awards.

Mr. Jimenez submits that neither *Gore* or *Campbell* impose a jurisprudential bar against large punitive damage awards or high punitive to compensatory damage

ratios. To the contrary, Mr. Jimenez submits that *Gore* and *Campbell* instruct that large punitive damage awards and high punitive to compensatory damage ratios awarded by a jury should not be disturbed unless concurrent concerns of overreaching beyond the State's interests are present.

In this matter, no concerns of overreaching (i.e., an award beyond that authorized, insufficient notice, extending beyond applicable statute, an unconstitutional statute or federalism issues) were present which should have triggered *Gore's* three guidepost analysis and the resulting remittitur from $161,000 to $80,000. The jury punished Paw-Paw's only for the harassment it committed against Mr. Jimenez in violation of well known federal statutes which apply uniformly across the nation. Unlike *Gore*, no concerns exist here that an individual state's statute was being applied to conduct beyond its borders. Unlike *Gore*, no evidence exists that Paw-Paw's lacked notice or that Paw-Paw's should not have known that its discriminatory conduct against Mr. Jimenez was sanctionable under Title VII and Section 1981. Also unlike *Gore*, no evidence exists that Paw-Paw's was punished for anything but its misconduct directed to Mr. Jimenez.

Applying *Gore's* three guideposts without any of the underlying concerns found in that case, or found in *Campbell*, reduces *Gore's* analysis to a simple ratio formula where lower courts can randomly substitute their judgment for that of the jury without just cause.[1] One scholar concurs that since the overreaching concerns of *Gore* and

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[1] Imposing a ratio absent concerns of overreaching is contrary to *Gore's* instruction not to adopt mere mathematical formulas. See *Gore* at 582-83.

Campbell (i.e., notice and federalism) are not typically present in the context of federally based discrimination claims, "The three factors used in *BMW* [*Gore*] to determine whether the punitive damage award is constitutionally excessive **should not be transferred** to the employment discrimination context." Stacey A. Hickox, *Reduction of Punitive Damages for Employment Discrimination: Are Courts Ignoring Juries?*, 54 Mercer Law Review 1081, 1091-1092 (Spring 2003).[2] This scholar concluded that the misapplication of *Gore's* three guideposts to employment matters can result in the improper usurpation of the jury's verdict by the courts. Mr. Jimenez submits that the jury, as the community's representative, was in a better position than the district court to determine the necessary punishment for Paw-Paw's who violated legislation, Title VII and Section 1981, designed to punish social transgressions.[3]

Mr. Jimenez submits that the district court should not have applied *Gore*'s three guidepost analysis unless there had been the concurrent determination that the jury overreached and based its punitive damage award on unrelated misconduct or conduct beyond the scope of the applicable statutes. The district court's remittitur, as affirmed by the Fifth Circuit, represents an improper

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[2] See Stacey A. Hickox, *Reduction of Punitive Damages for Employment Discrimination: Are Courts Ignoring Juries?*, 54 Mercer Law Review 1081 (Spring 2003), critiques the district court application of *Gore* in the matter sub judice because no constitutional challenge was even raised by Paw-Paw's below. *Hickox* at 1090.

[3] Further, the remittitur displaces the jury's verdict without any requirement or authority under the due process clause to do so. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 24-39 (U.S. Ala., Mar. 04, 1991) (SCALIA, J., concurring).

substitution of its judgment for that of the jury in conflict with *Gore*'s warnings against same.

II. The Fifth Circuit erred in affirming the district court's erroneous application of two of *Gore's* three guideposts.

Should it be determined that *Gore's* three guidepost analysis in the context of this federally based employment action was proper and necessary, the district court misapplied two of the three *Gore* guideposts in reducing the award. *Gore* enumerated three analytical guideposts: (1) the degree of reprehensibility of the conduct in question; (2) the degree of disparity between the actual harm *or* ***potential*** *harm* and the punitive damage award; and (3) the difference between the punitive damage award and analogous civil penalties ***authorized*** to be imposed in comparable cases. *Id.* at 573-576.

Gore held that the degree of reprehensibility of the conduct is the most important indicium of the reasonableness of a punitive damage award. *Id.* at 575. Here, the district court wrote that it found "a high degree of reprehensibility in the repeated, extensive, ethnically hostile verbal abuse by Paw-Paw's managers that plaintiff experienced, as found by the jury." (Paw-Paw's App. 28) This finding is based upon the overwhelming evidence which clearly satisfies the first and most important *Gore* guidepost.

The second, and lesser, guidepost is the relationship between the punitive damages award and both the actual harm caused by and the ***"potential"*** harm that could have arisen from Paw-Paw's conduct. *Gore* at 581-582. This Court, in discussing the relationship between compensatory and

punitive damages, recognized that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach." *Id.* This Court expressly rejected any set ratio as being required when it stated that a "mathematical bright line" is impossible and that each award should be analyzed on a case by case basis. *Id.* at 583. Moreover, the Court, setting out that remittitur of jury awards is the exception rather than the rule, held that "in most cases the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis." *Id.*

The Second Circuit in *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352 (2nd Cir. (N.Y.), Nov. 16, 2001) upheld a 100,000 to 0 ratio in affirming the jury's award of $100,000 in punitive damages against a defendant for having created a hostile work environment although no compensatory damages were awarded *Id.* at 356. The Second Circuit reasoned that "[T]he objectives of punitive damages by definition differ from the objectives of compensatory damages. There is some unseemliness for a defendant who engages in malicious or reckless violations of legal duty to escape either the punitive or deterrent goal of punitive damages merely because either good fortune or a plaintiff's unusual strength or resilience protected the plaintiff from suffering harm. It is often "precisely [in the cases where no actual harm is shown] that the policy of providing an incentive for plaintiffs to bring petty outrages

into court comes into play." *Id.* at 359, citing Prosser & Keeton on Torts § 2, at 14 and also Restatement (Second) of Torts § 908 cmt. (c).

Here, the district court erroneously stated *Gore*'s second guidepost to be "whether the punitive damages award bears a reasonable relationship to the compensatory damages." (Paw-Paw's App. p. 28a). The district court erred in omitting *Gore's* ***potential*** harm element found in the second guidepost. Analyzing the ***potential*** harm is critically important in discrimination cases because, as in *Cush-Crawford*, supra, the offending employer should not escape punishment because the victim suffered little or no damages due to his mental strength or ability to obtain another job with equal or better pay. As an analogy, a gunmen who shoots into a crowded street still should be severely punished even though everyone miraculously avoided injury from the bullets because the ***potential*** harm could have been dozens murdered.

Given the evidence and the district court's own finding of "reprehensibility" in Paw-Paw's conduct, the "potential" harm to Mr. Jimenez from that same conduct was great. The district court erred in only comparing the $161,000 punitive damage award to the $1 in nominal damages, and concluded that the 161,000 to 1 ratio was excessive. Instead, again assuming arguendo that *Gore*'s three guideposts apply, the $161,000 in punitive damages should also have been compared to the ***potential*** harm to Mr. Jimenez which could have resulted from Paw-Paw's reprehensible harassment.

One practical means of determining the value of the ***potential*** harm to Mr. Jimenez is to review the value the Fifth Circuit has placed on "actual harm" to plaintiffs in

discrimination cases. In *Salinas v. O'Neill*, 286 F.3d 827 (5th Cir. 2002), the Fifth Circuit surveyed several decisions affirming awards for actual harm to victims of discrimination. The *Salinas* court noted the $100,000 for emotional damages to the plaintiff in *Forsyth v. City of Dallas, Tex.*, 91 F.3d 769 (5th Cir. 1996), $100,000 to the plaintiff in *Williams v. Trader Publ'g Co.*, 218 F.3d 481 (5th Cir. 2000) for emotional distress due to "sleep loss," "severe loss of weight," and plaintiff began "smoking," and $150,000 to the plaintiff in *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 488 (5th Cir. 2001) for emotional damages arising from a failure to rehire. *Salinas* at 831. The Fifth Circuit in *Salinas* ultimately awarded $150,000 to the plaintiff for emotional damages.

A survey of these four comparable decisions establishes that the potential harm to Mr. Jimenez that he could have suffered included: depression, marital trouble, headaches, loss of prestige and social connection, despondence, discouragement, intestinal problems, and the commencement of addictive habits such as smoking. They likewise show that these injuries have been valued by the Fifth Circuit to range between $100,000 and $150,000. The conduct in these four decisions is materially identical to, or even less severe, than that in the matter *sub judice*, and is materially distinct from the economic only damages suffered by plaintiff Gore in *BMW*. Salinas did not get a promotion; Forsyth was transferred; Williams was fired, not repeatedly harassed; and Giles was simply rejected for rehire based on a disability, but was not harassed. *See Salinas*, 286 F.3d 827 (5th Cir. 2002). This conduct pales in comparison to that to which Paw-Paw's subjected Mr. Jimenez.

Therefore, the district court, in applying *Gore*'s second guidepost, should have compared the punitive damage award of $161,000 to the "potential" or "likely harm" of $100,000 to $150,000 as has been determined by the Fifth Circuit. This analysis would have yielded a ratio of 1.6 to 1 or 1.6 to 1.5. These ratios are unassailable on constitutional grounds in consideration of *Gore* and the Fifth Circuit's decisions.

Moreover, it is impossible to conclude that $161,000 is an amount that "shocks the conscience" when this amount represents less than two months of Paw-Paw's gross ***profit***. Assessing such an award only prevents Paw-Paw's owners from enjoying the benefits of profits it earns for approximately six weeks. This represents barely a slap on the wrist by most standards, not a constitutional violation. The district court's remittitur moots the intent of punitive damages provided for by 42 U.S.C. § 1981a.

Finally, the district court also erred in applying *Gore's* third guidepost by only comparing the jury's award to those punitive awards actually "imposed" in other cases. Such a comparison has limited value since each award should be reviewed on a case by case basis. Clearly, the facts giving rise to other reported awards can be vastly different from the claims before a court. Nevertheless, while some utility exists in the comparison performed by the district court, *Gore* also required the district court to compare the jury's punitive damages award to those "analogous" civil penalties that are "authorized" for similar misconduct, not just to those actually "imposed" in other reported cases. *Gore* at 583-84. The district court failed to do this.

The district court obviously overlooked that Congress has authorized the jury's award of $161,000 expressly and implicitly. Congress specifically has authorized awards of $300,000, inclusive of punitive damages, under 42 U.S.C. § 1981a. While the damages authorized under 42 U.S.C. § 1981a are not directly applicable to Mr. Jimenez's Section 1981 claims, they are ***analogous*** and do indicate that an award of $161,000 is well within the universe of punitive awards that has been contemplated by Congress. Such a comparison occurred in *Swinton v. Potomac Corporation*, 270 F.3d 794, 820 (9th Cir. 2001), where the appellate court expressly viewed Congress's authorization of $300,000 in damages under Title VII as providing an analogous example of damages to which a court can compare the propriety of a punitive damage award under a § 1981 action as required by *Gore's* third guidepost.[4] The Ninth Circuit ultimately affirmed the jury's award of $1,000,000 in punitive damages for the employment race discrimination claims before it. *Id.*

Moreover, 42 U.S.C. § 1981a(b)(1), which states, "A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual,"

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[4] See also *Romano v. U-Haul International*, 233 F.3d 655, 673 (1st Cir. 2000), holding a punitive damage award that comports with a statute "provides strong evidence that a defendant's due process rights have *not* been violated." (emphasis supplied)

contains no language requiring any award of compensatory damages as a prerequisite to awarding punitive damages. Further, Congress has placed no limitations on the amount of damages, either compensatory or punitive, which can be awarded in a 42 U.S.C. § 1981 action nor has Congress required any ratios. As such, the district court erred in imposing a cap or ratio upon an award that was not contemplated by Congress inasmuch as *Gore* admonishes that "substantial deference" should be accorded to "legislative judgments" concerning the appropriate degree of punishment for the conduct at issue. *Gore* at 583.

Further, the Fifth Circuit has affirmed awards of $125,000 and $750,000 in exemplary damages in *Forsyth v. City of Dallas, Tex.*, 91 F.3d 769 (5th Cir. 1996) further evidencing that the jury's award of $161,000 is constitutionally sound and not one that should shock the conscience of the district court, Fifth Circuit, or this Court.

The district court erred in comparing the jury's punitive damage award to only those awards in other cases and not also to those damages "authorized" by Congress. The district court's failure to do this review here prevented it from seeing the propriety of the jury's $161,000 award in the context of those analogous and authorized damages.

CONCLUSION

The Fifth Circuit erred in affirming the district court's remittitur of the jury's punitive damage award from $161,000 to $80,000. The district court erroneously usurped the jury's judgment without finding any specific due process violations or underlying concerns warranting

a remittitur under *Gore's* three guidepost analysis. Further, the district court misapplied two of the three guideposts of *Gore* resulting in a remittitur that undermined the deterrent and punishment effect of the jury's award.

Mr. Jimenez submits that deference should be extended to the jury's determination which, as the community's representatives, heard the evidence and determined that the $161,000 award was an appropriate sanction in light of Paw-Paw's outrageous abuse. Mr. Jimenez prays that the jury's award of $161,000 be reinstated as being consistent with both legislative and jurisprudential authority. Mr. Jimenez seeks and reserves the right to seek attorney's fees and costs made necessary by this petition and appeal.

Respectfully submitted,

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CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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CROSS-RESPONDENT'S BRIEF IN OPPOSITION

Cross-Respondent herein, Paw Paw's Camper City, Inc. (hereinafter "Paw Paw's"), urges the rejection of Cross-Petitioner, James V. Jimenez's ("Jimenez"), Cross-Petition for Writ of Certiorari; Paw Paw's contends Jimenez has failed to present valid legal argument for his position as he continues to misapply and misinterpret the binding decisions of *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996) and *State Farm Mutual Automobile Insurance Company v. Campbell*, ___ U.S. ___, 123 S.Ct. 1513 (2003).

Paw Paw's hereby incorporates, for the purposes of this brief, the information provided in Paw Paw's Petition for Writ of Certiorari sections labeled: "Questions Presented," "List of Interested Parties," "Corporate Disclosure Statement," "Jurisdiction," "Statutory and Regulatory Provisions Involved," and "Course of Proceedings and Disposition of the Case Below."

STATEMENT OF THE FACTS

Paw Paw's hereby incorporates its original Petition for Writ of Certiorari and Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari, and thereby adopts, for purposes of this brief, its original Statement of the Facts. However, Paw Paw's corrects the following information relayed in its "Course of Proceedings and Disposition of the Case Below" section. In said section, original Writ of Certiorari, Paw Paw's submitted on November 27, 2002, its post-trial motions were filed. As a correction, Paw Paw's submits it filed said motions on

November 27, 2001. Thus, Paw Paw's timely sought review.

In reply, Paw Paw's submits Jimenez's Brief in Opposition to Petition for Writ of Certiorari asserted certain erroneous facts. In his submission, Jimenez went to great lengths to portray Paw Paw's and its owners, as racists. Specifically, Jimenez contends he was the "only person of color in sales/management." (Jimenez's Response p. 3). Remarkably, Jimenez ignores that his brother was not only a "person of color in sales/management," but also that David Jimenez, an Hispanic American, partially owned the company at the time Jimenez was hired. Jimenez's blatant attempt to ignore his brother's heritage and ownership interest is erroneous and refutes Jimenez's assertions of sweeping, calculated racism at Paw Paw's.

Additionally, the Jimenez brothers were not the only minorities that were employed in management at Paw Paw's. In his response, Jimenez asserted he was the only minority present in Paw Paw's "all white sales and management staff." (Jimenez's Response, p. 5). Again, such an assertion ignores other employees' ethnic heritage. Even after the untimely death of David Jimenez, minorities continued to be employed as management staff at Paw Paw's. Ironically, Jimenez's alleged main abuser, Matt Margetta, General Manager and part owner, testified to and acknowledged his Italian heritage. In no uncertain terms, though Jimenez continues to paint a skewed picture, he was not the only Paw Paw's minority employee or management member.

Furthermore, W. B. Herring, Jr. and Matt Margetta repeatedly denied any such intentional discrimination or reprehensible conduct. At trial, both Mr. Herring and Mr.

Margetta testified and specifically denied intentional and non-intentional discrimination. In support, aside from argument, Jimenez has failed to present sufficient evidence of this alleged intentional wrong doing. Consequently, Jimenez's intentional discrimination arguments should continue to be dismissed as unfounded, as the jury verdict indicated.

SUMMARY OF THE ARGUMENT

Jimenez's arguments have no merit. In Jimenez's Conditional Cross-Petition for Writ of Certiorari, he presented two questions for review:

> (1) Whether the remittitur affirmed by the Fifth Circuit was unnecessary; and
>
> (2) Whether the Fifth Circuit erred in affirming the District Court's erroneous application of two of *BMW's* three guideposts.

Paw Paw's asserts the remittitur was absolutely necessary and Jimenez is mistaken in his assertion that the District Court, and the Fifth Circuit, misapplied the *BMW v. Gore* guideposts in favor of Paw Paw's.

In the Petition for Writ of Certiorari, Paw Paw's contended the jury award of punitive damages should be vacated by this Honorable Court. However, in the alternative, if this Honorable Court upholds the punitive damage award, Paw Paw's prays the punitive damage award be further reduced. Paw Paw's urges, in no event, the remittitur be set aside.

As to Jimenez's second issue, Jimenez has failed to show any substantive argument for the alleged legal

misapplication, but instead misapplies the decision of *BMW v. Gore* in his analysis. Consequently, Jimenez's Conditional Cross-Petition for Writ of Certiorari is without substance and should be summarily dismissed.

REASONS FOR DENYING JIMENEZ'S CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

I. Jimenez critically misplaces the focus of the Due Process analysis on the concept of overreaching while ignoring the central issue in both controlling decisions: the arbitrary deprivation of a citizen's property as unconstitutional.

According to *BMW v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996), the jury's punitive damage award should be vacated; however, if this Honorable Court upholds the punitive damage award, the award should be further reduced per the directives of *BMW v. Gore*.

Despite the jury's award of no actual damages, and final actual damages of one dollar as awarded by the Magistrate Judge through additur, Jimenez contends the final $80,000 punitive damage award is in conflict with the binding decisions of *BMW v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996) and *State Farm Mutual Automobile Insurance Company v. Campbell*, ___ U.S. ___, 123 S.Ct. 1513 (2003). In doing such, Jimenez critically misplaces the focus of the Due Process analysis on the concept of overreaching while ignoring the central issue in both controlling decisions: the arbitrary deprivation of a citizen's property as unconstitutional. This Honorable Court, in *BMW*, established three guideposts for determining whether a punitive damage

award is excessive only after amplifying the purpose of the guideposts by stating "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty that a state may impose." *BMW*, 517 U.S. at 574 and *State Farm*, 123 S.Ct. at 1520. The opinions of *BMW* and *State Farm* do not state that the respective punitive awards were reduced due to an overreaching nature of the jury's award; instead, the opinions evaluate excessiveness of a punitive damage award in relation to whether the defendant received "adequate notice of the magnitude of the sanction" as determined by 1) the degree of reprehensibility of the conduct, 2) the disparity between the harm or potential harm suffered by the plaintiff and his punitive damage award, and 3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases. *BMW* at 575. As such, the decisions of *BMW* and *State Farm* are not only binding and applicable in this case, but dictate the reduced punitive award of $80,000 to Jimenez, especially in light of the 80,000 to 1 ratio represented, is grossly excessive under the applicable Due Process analysis.

In *BMW*, the specific question presented was whether a two million dollar punitive damage award exceeded constitutional limits. *BMW* at 575. Erroneously, Jimenez argues that in order to apply *BMW*, Paw Paw's must first establish a constitutional violation. (Jimenez's Conditional Cross-Petition, pp. 5-9). However, Jimenez misses the point. *BMW* applies because the "excessive" nature of the punitive damage award is the constitutional violation that triggers the Due Process consideration. *BMW* at 575. In *State Farm*, this Honorable Court explained, "the Due Process Clause

of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 123 S.Ct. at 1519-1520. Paw Paw's contends the punitive damage award in this case was grossly excessive and completely arbitrary. As no actual damages were awarded by the jury, and only one dollar awarded by the District Court Magistrate, there is absolutely no indication as to how the punitive damages were calculated, or as to what actual harm they were meant to punish. The punitive damage award in this case is an example of an absolutely arbitrary award in violation of the Due Process considerations. Thus, regarding the overarching constitutional concern, Jimenez's assertions, that the trial court misapplied *BMW* in favor of Paw Paw's, are unfounded.

II. Jimenez's analysis of the application of the *BMW v. Gore* guideposts misinterprets and misapplies the law.

A. First Guidepost: The Reprehensibility Analysis

In specifically addressing the analysis under the *BMW* guideposts, Paw Paw's continues to stress that the alleged reprehensibility of the conduct in question does not alone elevate this case beyond application of the other aforementioned *BMW* factors. Paw Paw's maintains that under the established reprehensibility analysis hierarchy, the conduct alleged by Jimenez is not of the most reprehensible sort. The hierarchy of reprehensible conduct, as set forth in *BMW v. Gore*, requires consideration of whether "the harm was physical rather than economic; the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; the conduct involved repeated actions or was an isolated incident; and the harm resulted from intentional malice, trickery, or deceit, or

mere accident." *BMW v. Gore*, 517 U.S. at 576-577. Paw Paw's maintains the alleged conduct in question presented no physical harm to Jimenez, did not show any reckless disregard for the health or safety of others, nor was the result of intentional malice trickery or deceit. While the allegations were of more than an isolated incident, "the existence of any one of the factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damage award." *State Farm*, 123 S.Ct. at 1521. As such, Paw Paw's contends under these factors, the reprehensibility of the alleged conduct does not justify the disproportionate, unsubstantiated, excessive punitive damage award rendered against Paw Paw's.

Further, the jury's punitive damage award was based on improperly admitted evidence which prejudiced the jury. Despite Jimenez's arguments, the evidence regarding Jermaine Washington was not intricately connected to Jimenez's claims and should have been excluded. "Due Process will not permit courts in the calculation of punitive damages, to adjudicate the merits of the hypothetical claims of other parties under the guise of the reprehensibility analysis." *State Farm* at 1523. Throughout this case, Jimenez relied upon alleged discrimination against other minorities and alleged fraudulent business practices, which caused the jury to hear prejudicial information and base its decision on this improperly admitted evidence. Thus, taken in total, as this inflammatory evidence influenced the jury, the punitive damage award should be vacated.

Jimenez erroneously contends the punitive damage award is directly related to the alleged conduct of Paw Paw's staff, and that no evidence exists that Paw Paw's was punished for anything other than misconduct directed

at Jimenez. (Jimenez's Conditional Cross-Petition, p. 7). Paw Paw's contends that had a "direct relationship" been established at trial, an award of actual damages would have been made in favor of Jimenez, but instead Paw Paw's has been punished, through the incredibly disproportionate punitive damage award, for conduct that logically, considering the nominal amount of actual damages, cannot be linked to Jimenez personally. Paw Paw's asserts that logically, an award of actual damages would signify the jury's acknowledgement of harm to Jimenez, and thereby, suggests any punitive damages awarded would serve as punishment for the actual harm to Jimenez. However, no such actual damage award was made by the jury, though actual damages would have been simple to calculate, and only a nominal amount of one dollar was awarded by the judge. Therefore, no personal harm to Jimenez was established at trial and any punitive damages leveled against Paw Paw's must be for conduct unrelated to Jimenez personally. The only other plausible explanation is that if the alleged conduct against Jimenez is the supporting basis for the punitive damage award, the punitive damage award is improper. If the alleged conduct of Paw Paw's was not egregious enough to cause actual harm to Jimenez, the conduct certainly cannot be egregious enough to warrant punitive damages.

B. The Second Guidepost: Ratio Analysis

Addressing the second *BMW* guidepost, Jimenez's potential harm argument is flawed. In support, Jimenez submits that an evaluation of his potential harm would substantiate the punitive damage award. Repeatedly, throughout the history of this matter, the jury and the lower courts agreed: Jimenez did not suffer any harm. In

this case, the issue of potential harm is irrelevant. Jimenez could not and did not establish any *actual* harm. Logically, if Jimenez did not suffer actual harm, he has no argument for potential harm. Only the most arbitrary of awards could be substantiated by potential harm, when no actual harm was found to be compensable.

In *Kolstad v. American Dental Assoc.*, 527 U.S. 526, 119 S.Ct. 2118 (1999), this Court "confirmed that a showing of discrimination will support compensatory damages, but more is needed for an award of punitive damages." *EEOC v. EMC Corporation of Massachusetts*, 205 F.3d 1339, 2000 WL 191819**7 (6th Cir. (Mich.)). Paw Paw's maintains that not only is "more needed" for an award of punitive damages, but that a verdict which finds no actual harm should not be allowed to stand as the support for an award of punitive damages. Furthermore, Paw Paw's reasons that potential damages, without a finding of actual compensatory damages, should never be the sole basis for a punitive damage award.

Jimenez consistently theorizes that the finding of no actual harm is of no moment and that punitive damages can fairly be based on potential harm to the defendant when no actual harm is found. In contradiction, Paw Paw's submits that while "potential harm" is mentioned in the second *BMW* guidepost, the term is not meant as a panacea by which plaintiffs who have neglected to prove actual harm may still justify an otherwise unsupportable, disproportionate, unconstitutional punitive damage award. Under Jimenez's analysis, he should be allowed to capitalize on actual damage awards which have been proven and supported in other cases, by other plaintiffs and under other facts, despite his total inability to prove harm to himself. In the interests of fairness and equity, the

proportionality of Jimenez's punitive damage award must be reviewed in light of his own actual damage award, not the actual damage awards rendered in other cases. Paw Paw's asserts the potential harm factor in an analysis must be supportable, specifically quantifiable and inextricably linked to the particular plaintiff, or otherwise be a gross example of the very arbitrary deprivation of property that the *BMW* decision is meant to extinguish.

Jimenez explains his reliance on potential damages, without any finding of actual damage, by analogizing that "a gunman who shoots into a crowded street still should be severely punished even though everyone miraculously avoided injury from bullets because potential harm could have been dozens murdered." (Jimenez's Conditional Cross-Petition, p. 11). Paw Paw's contends that the aforementioned analogy is simplistic in that it disregards proportionality of punishment to harm. However, Jimenez's use of this analogy is typical of his approach to this case in that it represents an attempt to cloud the issue at hand with something more emotional. No one's life was endangered or threatened in this case, and Jimenez did not suffer any harm. Jimenez's reliance on the sensational is an attempt to avoid the merits of this case, as was his reliance on the alleged discrimination of other races and other analogies that do not bear similarity to the matter at hand.

Jimenez cites *BMW* when asserting that adjusting the actual damage award to account for potential harm, and not restricting punitive damage awards to amounts that are proportionate to the actual damage award, is "justified in cases in which injury is hard to detect or non-economic harm might have been difficult to calculate." (Jimenez's Conditional Cross-Petition, p. 10). Paw Paw's asserts this

particular case is a prime example of an instance where actual damages, if they had been present, would have been easily identifiable and calculable. At trial, Jimenez offered evidence to the jury concerning actual damages. Jimenez presented figures depicting all allegedly lost wages, all possible negative impact on his earning potential allegedly resulting from the accused conduct, and testimony of a doctor concerning the effects of the alleged conduct on Jimenez's mental state. Despite enjoying ample opportunity, Jimenez failed to prove actual damages because all of the aforementioned evidence was categorically rejected by the jury.

C. The Third Guidepost: The Comparison

Regarding the third *BMW* guidepost, Jimenez proposes that because Congress has authorized punitive damage awards up to $300,000.00, in Title VII cases, damage awards of such a magnitude should be applicable in the instant case. (Jimenez's Conditional Cross-Petition, p. 14). However, proper reading of the applicable guidelines recognizes that important limitations govern such awards. Specifically, 42 U.S.C. § 1981(b)(3) provides:

> The sum of the amount of compensatory damages awarded under the section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party-
>
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000.00;

> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of the 20 or more calendar weeks in the current or preceding calendar year, $100,000.00;
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000.00; and
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.00.

Paw Paw's does not meet the requirements for the $300,000.00 punitive award, and therefore should not be subject to analogies which imply that the maximum penalty authorized under 42 U.S.C. § 1981(b)(3) would be appropriate in the instant case. In short, Paw Paw's did not employ in excess of 500 employees during the requisite time period. Further, Jimenez has no support for the repeated implication that Paw Paw's employed in excess of 500 people during the period in question. (Jimenez's Response, p. 14, Jimenez's Cross-Petition, p. 14). As such, with every insinuation that Paw Paw's is of comparable size to an entity that would be subject to the $300,000.00 maximum penalty, Jimenez misrepresents the truth. In fact, Paw Paw's had substantially fewer employees, which would not even come into consideration under (C) or (D) above. Though Congress has authorized awards of $300,000.00, such awards have been "authorized" in conjunction with the size of the respondent's work force and the gravity of the conduct, reserving the "maximum permissible awards" for the most egregious cases of discrimination. *Hennessey v. Penril Datacom Networks,*

Inc., 69 F.3d 1344, 1355 (C.A. 7 (Ill.) 1995). Consequently, Jimenez has misinterpreted the "authorized" punitive damage awards, as they conceivably could not apply to Paw Paw's, because Paw Paw's work force does not mandate maximum award figures, nor could the maximum punishment be fairly exacted against Paw Paw's. Paw Paw's submits that interests of fairness dictate a maximum penalty only be awarded, or analogized, in cases where the work forces are accurately compared for size, and the alleged conduct is at least egregious enough to be quantified in terms of actual harm to the plaintiff.

CONCLUSION

Paw Paw's prays Jimenez's Conditional Cross-Petition for Writ of Certiorari be denied. Paw Paw's also respectfully requests any awards and costs be properly vacated. In the further alternative, Paw Paw's requests its Writ of Certiorari be granted.

Respectfully submitted,

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